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No. 79-1952

In the Supreme Court of the United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, ET AL., APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, EN BANC

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

(1) Whether 2 U.S.C. § 437h should be construed to be consistent with the Commission's exclusive enforcement authority and the orderly processes of federal courts.

(2) Whether this Court should affirm the *en banc* decision of the court of appeals that 2 U.S.C. §§ 441a (a) (1) (C), 431 (8) (B) (vi),* and 441b (b) (2) (C) are consistent with the first and fifth amendments to the Constitution of the United States.

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* *See* note 3, *infra.*

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BRIEF FOR APPELLEES

OPINIONS BELOW

The May 23, 1980, opinion of the United States Court of Appeals for the Ninth Circuit (J.S. at A-1)[1] is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127. The order of the United States District Court for the Northern District of California which certified constitutional questions to the court of appeals (J.S. at A-82) is not reported. The October 21, 1980, opinion of the United States District Court for the Northern District of California in the related enforcement action (App. Br. at A-1) is not reported.

JURISDICTION

Appellants assert jurisdiction in this Court pursuant to 2 U.S.C. § 437h.[2] On October 6, 1980, this Court post-

[1] As used herein "J.S." refers to appellants' jurisdictional statement, "J.A." refers to joint appendix, and "App. Br." refers to Brief of Appellants.

[2] This provision is § 310 of the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-225, 86 Stat. 3,

poned consideration of jurisdiction until hearing on the merits. J.A. at 32.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("FECA" or "Act"). Specifically at issue are 2 U.S.C. §§ 437g and 437h with regard to the jurisdiction of this Court, and 2 U.S.C. §§ 441a(a)(1)(C), 431(8)(B)(vi),[3] and 441b with regard to the merits of the decision below. For the Court's convenience, the Commission submits herewith ten copies of *Federal Election Campaign Laws* compiled by the Federal Election Commission.

COUNTERSTATEMENT OF THE CASE

2 U.S.C. § 437c(b)(1) vests in the Federal Election Commission ("FEC" or "Commission") exclusive jurisdiction with respect to civil enforcement of FECA.[4] Set

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as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655, and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. The revelant provisions of the Act are codified in Title 2, United States Code. Because of the recent amendments to the statute, citations herein will be to the United States Code sections as they appear in United States Code Annotated (West Cum. Ann. Pocket Part 1980), unless otherwise indicated.

[3] Section 431(8)(B)(vi) is the recodification of former 2 U.S.C. § 431(e)(5)(F) pursuant to Sec. 101 of the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 at 1341. The court of appeals' decision used the former citation, § 431(e)(5)(F).

[4] *See In re Carter-Mondale Election Committee, Inc.*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9132 (D.C. Cir. 1980); *Federal Election Commission* v. *Americans for Change*, Nos. 80-1754, 80-1609 (D.D.C. Sept. 30, 1980) (three-judge court), *notice of appeal filed*, October 8, 1980, App. Br. at A-46; *Common Cause* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9123 (D.D.C. 1980) at 50,952; *In re Federal Election Campaign Act Litigation*, 474

out in § 437g is an elaborate and detailed enforcement procedure which includes expedited, *de novo* review in the district court, appeal to the court of appeals and review by this Court upon *certiorari* or certification pursuant to 28 U.S.C. § 1254. *See* 2 U.S.C. § 437g(a)(6)-(9). In addition, FECA contains a separate, extraordinary judicial review provision intended for "actions . . . as may be appropriate to construe the constitutionality of any provision of" FECA. 2 U.S.C. § 437h.

A. Proceedings Before the Commission

On October 4, 1978, the Commission found "reason to believe" that the California Medical Association ("CMA"), an unincorporated association, had violated 2 U.S.C. § 441a(a)(1)(C) by contributing in excess of $5,000 per calendar year to the California Medical Political Action Committee ("CALPAC"), a multicandidate political committee, and that CALPAC had violated 2 U.S.C. § 441a(f) by knowingly accepting such contributions.[5] 2 U.S.C. § 437g(a)(2). Letters notifying CMA

F. Supp. 1051 (D.D.C. 1979); *Walther* v. *Baucus*, 467 F. Supp. 93 (D. Mont. 1979); *Walther* v. *Biden*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9084 (D. Del. 1979); *Walther* v. *Anderson*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9085 (D. Minn. 1979); *Durkin for U.S. Senate Committee* v. *Federal Election Commission*, No. C80-503D (D.N.H. Oct. 31, 1980).

[5] FECA provides that a "person" (defined at 2 U.S.C. § 431(11) to include associations) may contribute $1,000 per election to a federal candidate, $20,000 per calendar year to national party committees, and $5,000 per calendar year to any other political committee. 2 U.S.C. § 441a(a)(1). A "multicandidate political committee," defined at 2 U.S.C. § 441a(a)(4), may contribute $5,000 to a candidate, $15,000 to national party committees, and $5,000 to any other political committee. Individuals are limited to contributing $25,000 overall in any calendar year. 2 U.S.C. § 441a(a)(3).

Corporations and labor organizations may not, consistent with FECA, make any contribution or expenditure in connection with federal elections. 2 U.S.C. § 441b(a). The exceptions to this proscription allow corporations and labor organizations to pay for communications and certain non-partisan activities directed at specified classes and to pay for the establishment, administration,

and CALPAC of the Commission's action were sent on October 16, 1978. On November 15, 1978, after providing CMA and CALPAC a reasonable opportunity to demonstrate that no action should be taken, the Commission determined there was "reasonable cause to believe" that CMA had violated § 441a(a)(1)(C) and that CALPAC had violated § 441a(f). 2 U.S.C. § 437g (a)(5)(A) (1976).[6] The Commission endeavored to correct the apparent violations through informal conciliation but such efforts failed. Thus, on April 19, 1979, the Commission determined there was probable cause to believe that the Act had been violated and authorized its staff to institute a civil action for relief.[7] 2 U.S.C. § 437g(a)(6)(A). The Commission notified CMA and CALPAC that it would file a civil action to enforce the statute.

B. CMA v. FEC

Fourteen days after CMA and CALPAC were advised that the Commission had authorized a civil enforcement action, the instant action was filed, challenging the statutory provisions sought to be enforced, and seeking an injunction to prevent enforcement. *California Medical Association* v. *Federal Election Commission*, ("*CMA* v.

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and solicitation expenses of a separate segregated political fund. 2 U.S.C. § 441b(b)(2).

The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8). Exempted from this definition is "any payment made or obligation incurred by a corporation or a labor organization which, under § 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." 2 U.S.C. § 431(8)(B)(vi).

[6] The 1979 FECA Amendments eliminated the "reasonable cause to believe" determination in the Commission's enforcement procedures.

[7] The Commission's enforcement action alleged three violations by CALPAC. The second and third claims were resolved by a consent order filed on January 18, 1980. App. Br. at A-4 n.3.

FEC") J.A. at 4.[8] On May 17, 1979, CMA and CALPAC moved the district court in the instant case for certification of constitutional questions pursuant to § 437h. Plaintiffs argued that their "right to have a constitutional question certified immediately to the Court of Appeals is set forth in § 437h . . ." and that "[i]t is clear from the language of § 437h(a) that the District Court *must* immediately certify all questions of constitutionality to the Court of Appeals." Plaintiffs' Memorandum in Support of Motion for Certification at 7-8 (emphasis in original). The district court denied the Commission's motion to dismiss, which had argued, *inter alia*, that § 437h was not intended and should not be used to circumvent § 437g enforcement procedures. On July 9, 1979, the district court certified questions to the court of appeals *en banc*.[9] J.S. at A-82.

On August 1, 1979, the court of appeals set the briefing schedule for the instant case. J.A. at 30. The court specifically ordered that the parties:

> . . . address the constitutionality of the portion of 2 U.S.C. § 437h(a) which requires the United States Court of Appeals to hear this matter sitting en banc.

Id. On May 23, 1980, the court of appeals rendered its decision. J.S. at A-1. The court upheld the constitutionality of the challenged provisions, and, with regard to FECA's extraordinary jurisdictional provision, stated:

> We hear the appeal en banc pursuant to Fed. R. App. P. 35. Standing and jurisdiction are conferred by, *inter alia*, 2 U.S.C. § 437h(a) (1976). *See*

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[8] The Commission authorized suit on April 19, 1979, and notified CMA and CALPAC on April 23, 1979. CMA filed the instant action on May 7, 1979.

[9] The district court apparently construed § 437h as a mandatory certification procedure:

> Pursuant to the procedures *mandated by FECA*, this Court certified to the Ninth Circuit the constitutional questions raised in the doctors' declaratory judgment action. *See* 2 U.S.C. § 437h(a).

App. Br. at A-5 (emphasis added).

> *Buckley* v. *Valeo*, 424 U.S. 1, 8-12 (1976) (per curiam).

Id. at A-3. However, after posing the question of § 437h's constitutionality and of the potentially "severe and disruptive" effect of § 437h on the court's calendar, the court of appeals concluded:

> Delicate questions such as those here suggested [concerning § 437h] are to be decided only when necessary. We think the better course is to let our decision to hear the case en banc rest on our authority under Fed. R. App. P. 35. *See Buckley* v. *Valeo*, 519 F.2d 821, 902 n.2 (D.C. Cir. 1975) (per curiam) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (per curiam).

J.S. at A-26.

C. FEC v. CMA

The Commission filed its enforcement action, the case CMA and CALPAC sought to prevent, in the same district court fifteen days after the instant case was filed. *See* note 8, *supra*. *Federal Election Commission* v. *California Medical Association*, No. C-79-1197-WHO (N.D. Cal. Oct. 21, 1980) ("*FEC* v. *CMA*"), App. Br. at A-1. Thus, the instant case, before the *en banc* court of appeals, proceeded simultaneously with the Commission's enforcement action in the district court. On October 21, 1980, the district court issued its opinion. App. Br. at A-1. Judge William H. Orrick noted in the court's opinion that "[t]he defenses raised by CMA and CALPAC were virtually identical to their affirmative claims in the [instant] declaratory judgment action." App. Br. at A-5. The district court held that CMA and CALPAC had violated the Act and that judgment should be entered in favor of the FEC.

The Commission's enforcement action—the case in which the substantive allegations herein were raised as affirmative defenses—is not before this Court. Rather, that case is subject to review by the court of appeals and by this Court only upon *certiorari* or certification. 2 U.S.C. § 437g(a)(9). CMA and CALPAC have until

February 9, 1981, to appeal the district court's decision in *FEC* v. *CMA* to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

I

This case presents the threshold issue of the proper construction of 2 U.S.C. § 437h, a provision enacted by Congress in 1974 for the specific purpose of facilitating the resolution of a major constitutional challenge to the Act prior to the 1976 general election. *See Buckley* v. *Valeo*, 519 F.2d 817, 820 (D.C. Cir. 1975) (Bazelon, J., dissenting) (extraordinary procedure of § 437h was designed for the *Buckley* challenge, and the *Buckley* case was *sui generis*), *aff'd in part*, 424 U.S. 1 (1976) ("*Buckley*"). Section 437h is to be utilized in a manner consistent with the exclusive enforcement authority of the Federal Election Commission and with the orderly process of adjudication in federal courts contemplated in 2 U.S.C. § 437g.

However, appellants herein, the California Medical Association (an unincorporated association) and the California Medical Political Action Committee (a political committee), seek to invoke the extraordinary process of § 437h for the purpose of avoiding the Commission's enforcement procedures. The Commission submits that Congress did not intend § 437h to be used for such a purpose. A finding to the contrary would be inconsistent with congressional intent to vest in the Federal Election Commission exclusive jurisdiction for the application and enforcement of FECA. To permit § 437h to be invoked in this case would bring about the disruption of the enforcement procedures of FECA and of the judicial process of federal courts.

Thus, this Court should find that no right of appeal lies herein since constitutional questions were improperly certified to the court of appeals. Moreover, the Commission submits that the appellate court's reliance on Rule 35 of the Federal Rules of Appellate Procedure (rather than

on § 437h) as its basis for its *en banc* consideration of this case supports the Commission's position that this case is not properly before this Court by right of appeal.

Treating appellants' jurisdictional statement as a petition for *certiorari*, the Court should deny the petition or affirm the judgment of the court of appeals as to the constitutionality of the challenged provisions.

II

Should this Court decide that an appeal lies, or, treating appellants' jurisdictional statement as a petition for *certiorari*, decide not to deny the petition, the Court should affirm the decision below. The provisions challenged by appellants violate neither the first amendment nor the fifth amendment to the Constitution of the United States.

A

The $5,000 limitation on contributions to political committees is plainly within first amendment bounds under the principles established by this Court in *Buckley*. As the court below found, the $5,000 limit serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley* to uphold other contribution limits of FECA. It prevents persons, including associations like CMA, from contributing massive, unlimited sums to political committees such as CALPAC, thereby effecting contributions to candidates well beyond $1,000 in amount.

As with the contributions held to be limitable in *Buckley*, a contribution to a political committee is no more than a "symbolic expression of support" which can only result in political expression "by someone other than the contributor." *Buckley*, 424 U.S. at 21. Thus, the limitation on such contributions does not restrict "core First Amendment expression." *Id.* at 48.

Other provisions of FECA do not fully satisfy the vital governmental interest in preventing circumvention of the per candidate contribution limitations through the device of contributing to political committees likely to support a particular candidate. The $5,000 limitation on contribu-

tions to political committees is thus closely drawn to further the interests found sufficient by this Court in *Buckley*.

B

The provisions of FECA which separately regulate corporations and labor organizations and which allow them to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund, do not violate the equal protection component of the fifth amendment. As the court below observed, the corresponding prohibitions and restrictions applicable only to corporations and labor organizations under 2 U.S.C. § 441b make inapposite any comparison with unincorporated associations such as CMA.

Congress had a rational basis for, and indeed a compelling interest in, separately limiting political contributions and expenditures by corporations and labor organizations. That Congress created an exemption from the restrictions applicable to these organizations for the establishment, administration and solicitation expenses of a separate segregated fund does not negate the rationale of the classification.

Unlike persons not regulated under § 441b, corporations and labor organizations can make neither contributions nor expenditures in connection with any federal election. Partisan communications and certain voter registration and get-out-the-vote activities may not extend beyond stockholders, executive and administrative personnel, members, and their families. Solicitations for contributions to a corporation's or labor organization's separate segregated political fund are specifically restricted by the statute in terms of who may be solicited, and when and how they may be solicited. The argument that unincorporated associations and other persons are situated similarly to corporations and labor organizations is undercut by the fact that unincorporated associations are not subject to the restrictions of § 441b. This demonstrates that Congress has not violated due process by permitting certain confined activity to the latter organizations.

ARGUMENT

I. SECTION 437h SHOULD NOT BE CONSTRUED TO DISRUPT THE COMMISSION'S EXCLUSIVE ENFORCEMENT AUTHORITY OR THE ORDERLY PROCESSES OF FEDERAL COURTS.

This Court, on October 6, 1980, postponed consideration of jurisdiction until hearing on the merits of the instant action. J.A. at 32. The Commission submits that Congress intended that § 437h, the provision upon which appellants rely for jurisdiction in this Court, be narrowly construed. Such a construction would prevent disruption of FECA's orderly enforcement procedures and would avoid premature constitutional adjudication and piecemeal litigation [10] and the consequent disruptive effects upon federal courts.[11]

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[10] *See Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176 (1955):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of related appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

Id. at 178, *quoting McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891). *See also Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Andrews* v. *United States*, 373 U.S. 334 (1963).

[11] *See Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc., supra*:

> A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. . . . I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals.

385 U.S. at 25 n.3, *quoting Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2d Cir. 1960) (Clark, J., dissenting).

A. Congress Enacted § 437h for a Specific, Limited Purpose.

FECA's expedited review provision was enacted by Congress as a special mechanism to provide prompt judicial consideration of constitutional questions raised during congressional debate over the Federal Election Campaign Act Amendments of 1974.[12] This unique jurisdictional provision was introduced by Senator Buckley during consideration of S. 3044. Senator Buckley defined the purpose of the amendment:

> It merely provides for the expeditious review of the constitutional questions I have raised.[13]

On June 26, 1974, the Committee on House Administration drafted its version of the 1974 FECA Amendments. Congressman Frenzel proposed an amendment which was identical to Senator Buckley's:

> This is a Judicial Review amendment and its intent is simply to speed up a Judicial Review on the Constitutionality of any Section of this particular bill. It was known as the Buckley amendment in the Senate and . . . it seems to me it is a good idea to

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[12] Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[13] 120 Cong. Rec. 10562 (1974). *Buckley* v. *Valeo*, 519 F.2d at 820 (Bazelon, J., dissenting) (the extraordinary procedure of § 437h was designed for the *Buckley* challenge and the *Buckley* case was *sui generis*); *Martin Tractor* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (1978), *aff'd*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied sub nom, National Chamber Alliance for Politics* v. *Federal Election Commission*, 49 U.S.L.W. 3332 (1980) (*"Martin Tractor"*) ("Section 437h(a) had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. . . ."); *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 134 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), No. 80-2069 (D.C. Cir. Sept. 4, 1980) (*"Mott"*) ("Arguably, Senator Buckley was concerned only with the expedited review of the sweeping changes contained in the 1974 Amendments").

> have a process that offers a chance for speedy review of questions on the bill.[14]

Discussion in the markup session centered upon the multiplicity of suits which this provision might encourage and the accompanying strain on federal courts due to the *en banc* review requirement. The review provision of the House bill, essentially identical to that introduced by Senator Buckley, became § 207(c) of H.R. 16090, as introduced. The conferees accepted the House version:

> The Conference substitute generally follows the House amendment and makes it clear that these special judicial review provisions are available only for actions directed at determining the constitutionality of provisions of the Act and of provisions of title 18, United States Code, related to the activities regulated by the Act.[15]

This became § 315 of FECA, as amended, 2 U.S.C. § 437h.

In addition to the review provision of § 437h, Congress vested enforcement authority in the FEC. The Act requires that the Commission bring actions to enforce the Act *de novo* in district court with judicial review of district court orders upon petition to the court of appeals and petition for *certiorari* or certification to this Court.[16] Congressman Hays characterized the intent of Congress when he stated:

> . . . the delicately balanced scheme of procedures and remedies set out in the Act is intended to be the exclusive means for vindicating the rights and declaring the duties stated therein. . . .

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[14] Markup - Federal Election Campaign Act Amendments of 1974 by the House Comm. on House Administration, 93d Cong., 2d Sess. 704 (1974).

[15] H.R. Conf. Rep. No. 93-1438, 93d Cong., 2d Sess. 96 (1974).

[16] 2 U.S.C. § 437g(a)(5), (a)(9) (1970) (Supp. V). Both provisions were subsequently amended to their present form by § 109 of the Federal Election Campaign Act Amendments of 1976, *supra*, and § 108 of the Federal Election Campaign Act Amendments of 1979, *supra*.

120 Cong. Rec. 35134 (1974). The Federal Election Campaign Act Amendments of 1976 and 1979, *supra*, maintained this balance of rights and remedies.

B. Congress Did Not Intend That the Extraordinary Procedure of § 437h Be Employed to Disrupt Enforcement Actions Brought By The Commission.

The legislative history of §§ 437g and 437h gives no indication that Congress contemplated that persons brought into the enforcement process and entitled to its judicial review mechanism would be able to compel the extraordinary procedures of § 437h with regard to that enforcement action. Instead, Congress created one mechanism for judicial consideration of pending Commission enforcement proceedings, and another for constitutional challenges to FECA under § 437h. Congressional intent in this regard must be given effect.

In the first instance, Congress has employed a traditional role for federal courts—prosecutorial action brought by an agency in federal district court in which a defendant may raise all defenses and from which lies an appeal to the court of appeals. In the second instance, Congress enacted a very narrow provision pursuant to which *en banc* courts of appeals have jurisdiction to hear and decide certified constitutional questions. This provision, § 437h, is limited to appropriate constitutional questions raised by eligible plaintiffs concerning the facial constitutionality of FECA. Challenges to the Act as applied to defendants, challenges to Commission regulations, or actions to construe the Act are not appropriate under § 437h.[17] A more expansive reading of § 437h would encourage respondents in Commission enforcement matters, and plaintiffs in actions against the Commission under § 437g(a)(8),[18] to circumvent the pro-

[17] Section 437h, by its very language limits action thereunder to "actions . . . as may be appropriate to construe the constitutionality *of any provision of this Act.*" (Emphasis added). *See also* section C, *infra* at 18; *Buckley* v. *Valeo*, 519 F.2d at 851.

[18] 2 U.S.C. § 437g(a)(8) provides that a person aggrieved by Commission action dismissing his or her § 437g(a)(1) complaint,

cedure for judicial review established by Congress in § 437g and to compel an *en banc* court of appeals and this Court to decide constitutional defenses in the midst of an enforcement proceeding.

The instant case presents just that situation. Appellants, advised that the Commission was about to file an enforcement action in district court, immediately sought to circumvent that action by instituting this case. Parallel to the § 437h case, the Commission's enforcement action proceeded in the district court, where CMA and CALPAC raised, briefed and argued the certified questions as affirmative defenses. Thus, the federal court system, needlessly and contrary to congressional intent, was burdened with two separate cases involving the same parties, posing the same constitutional issues and arising from the same set of facts. These two cases, however, will proceed through the federal court system and to this Court in a dramatically different fashion. The enforcement action, which is not yet before this Court, is subject to appeal to the court of appeals in the traditional manner and subject to review, upon *certiorari*, by this Court. 2 U.S.C. § 437g(a)(9). The instant action, however, alleging § 437h jurisdiction, was certified to

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or by a failure of the Commission to timely act, has a right of action against the Commission in federal court. Recently, in *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*, No. 80-0354 (D.D.C. Dec. 16, 1980), plaintiffs brought such an action alleging, in Count one, that the Commission's interpretation' of FECA was contrary to law. Counts two, three and four alleged that if the Commission's statutory construction was not contrary to law then the statute is unconstitutional. The FEC's motion for summary judgment as to Count one was granted but its motion to dismiss the remaining Counts, and to deny § 437h certification, was denied. *Id.* The court stated that it "is aware that this course could result in parallel proceedings in the Court of Appeals, with a three-judge panel hearing an appeal from this court's ruling on the first cause of action and the en banc Court considering the constitutional questions." *Id.*, slip op. at 9 n.14. However, the court concluded that "[o]nce constitutional questions emerge in the course of litigation, the statute requires prompt certification to the appellate court." *Id.*, slip op. at 8.

the *en banc* court of appeals and is now before this Court by alleged right of appeal.[19] Because appellants filed the instant action, they have successfully avoided review of their affirmative defenses under the § 437g procedure. The Commission submits that such dual litigation makes a mockery of the carefully drafted procedure enacted by Congress and codified in § 437g.

Additionally, such simultaneous litigation encourages piecemeal adjudication, needlessly burdening the federal judiciary as well as the Commission. According to appellants' reading of § 437h, any person[20] who is brought into the enforcement procedure, receiving, for example, a notification required by § 437g(a)(2), could file immediately a declaratory and injunctive action raising affirmative defenses framed in constitutional terms,[21] while the Commission is required by statute to proceed on a complaint filed pursuant to § 437g(a)(1) within the time constraints established in § 437g. Under appellants' theory, the respondent in the enforcement procedure could bring a portion of that matter—the affirmative defense—to the federal courts under § 437h while the enforcement matter was pending before the Commis-

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[19] The court below specifically disclaimed § 437h as the basis for its *en banc* decision, relying instead upon Rule 35, FRAP. J.S. at A-26-27. Where, as in the instant case, the court of appeal's *en banc* decision is not rendered pursuant to § 437h, no right of direct appeal to this court should lie pursuant to that provision.

[20] Since neither CMA nor CALPAC is "The Commission, the national committee of any political party or [an] individual eligible to vote," this case necessarily raises the issue of the proper construction of § 437h standing. *Cf. Martin Tractor*, 460 F. Supp. 1017 (D.D.C. 1978), *with Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d 29 (7th Cir. 1979). *See* discussion, *infra*, at 20-21.

[21] *See, e.g., FEC* v. *Lance*, No. 78-1859 (5th Cir.) (*sua sponte* certification to *en banc* court of the constitutionality of § 441b in context of subpoena enforcement action); *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) (constitutional challenge raised by intervenor in an enforcement action and certified prior to decision on the enforcement action). *See also* note 18, *supra*.

sion. Not until the Commission filed its enforcement action in court, if it determined that such action should be taken,[22] would the entire case be within the judicial system. Again, however, the affirmative constitutional defenses and the Commission's enforcement action would proceed through different courts under different procedures.[23]

Moreover, CMA/CALPAC's construction of § 437h is contrary to traditional principles of constitutional adjudication. Even prior to the Commission's, or the district court's, interpretation as to the applicability of the statute, the *en banc* court of appeals is asked to rule on the constitutionality of a provision of the Act. This court has long disfavored this type of constitutional adjudication. Even in cases before the Court under the former Criminal Appeals Act of 1907, as amended, 18 U.S.C. § 3731,[24] constitutional adjudication was avoided, where possible:

> The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed

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[22] Only by a vote of 4 of its 6 voting members may the Commission authorize a civil action to enforce the Act. *See* 2 U.S.C. §§ 437c(c), 437d(a)(6). *See also Buckley*, 424 U.S. at 112 n.153.

[23] Since the Judiciary Act of 1789, 1 Stat. 73, 84, the policy of federal courts has been that appeal will lie only from a final decision. *See, e.g., Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940); 28 U.S.C. § 1291. Exceptions to this policy have been narrowly construed. For example, in *Parr* v. *United States*, 351 U.S. 513 (1956), the Court stated that "extraordinary writs . . . may not be used to thwart the congressional policy against piecemeal appeals." *Id.* at 520. *See also Switzerland Cheese Association, Inc.* v. *E. Horne's Market, supra* (narrow interpretation of 28 U.S.C. § 1292(a)(1) "lest a floodgate be opened that brings into the exception many pretrial orders"). 385 U.S. at 23-24.

[24] 18 U.S.C. § 3731 (1964) (Supp. V) prior to amendment by the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, provided for direct appeal from district courts to this Court from certain decisions and judgments. Thus, "decisions of District Courts raise almost abstract questions of law regarding the invalidity or construction of criminal statutes, in that they do not come here in the setting of normal adjudications on the merits of a controversy." *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 127 (1948) (Frankfurter, J., concurring) ("*U.S.* v. *CIO*").

> admonition, of self-imposed inhibition against passing on the validity of an Act of Congress "unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U.S. 283, 295. Observance of this principle makes for the minimum tension within our democratic political system where "scarcely any question arises . . . which does not become, sooner or later, a subject of judicial debate." 1 De Tocqueville, Democracy in America (4th Am. ed. 1843), 306. (footnote omitted).

United States v. *International Union, United Automobile Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 590 (1957). *See also U.S.* v. *CIO*, 335 U.S. at 106; *Martin Tractor*, 627 F.2d at 379. Section 437h should not be construed to require constitutional adjudication in advance of more traditional judicial consideration as to the meaning and application of the statute. Absent such statutory construction and a determination of its applicability, federal courts will be faced, in § 437h cases, with the ever-present possibility of rendering advisory opinions, a task considered beyond the jurisdiction of federal courts since 1793 when President Washington requested that Chief Justice Jay construe certain federal laws and treaties. *See* 3 *Correspondence and Public Papers of John Jay* 486 (H. Johnston ed. 1893).[25]

Finally, CMA/CALPAC's interpretation of § 437h divests federal courts of any discretion in declaratory § 437h actions. CMA and CALPAC argued to the district court that it was required to certify questions.[26] Appel-

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[25] Indeed, a reading of § 437h which would require a federal court to issue an advisory opinion on the constitutionality of FECA would "prevent . . . [the judiciary] from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977).

[26] *See* note 9 *supra* and accompanying text. *But see Martin Tractor*, 627 F.2d at 379 n.10, *citing Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 243 (1952) ("the propriety of declaratory relief in a particular case will depend upon a circum-

lants now argue to this Court that "[o]nce the court of appeals has decided a matter properly certified under [§ 437h(a)] the right of appeal to this Court lies." App. Br. at 18. Under this construction no court, including this Court, could determine or review the propriety of certification.

The present case demonstrates the absurdity of expanding § 437h to encompass affirmative defenses to an enforcement action. Should CMA and CALPAC appeal the district court's decision in *FEC* v. *CMA*, the Ninth Circuit will be confronted again with the same controversy, though limited to non-constitutional issues. Presumably, the case would then reach this Court again by petition for writ of *certiorari*. Clearly, such duplication and waste of judicial resources could have been—indeed should have been—avoided by declining § 437h jurisdiction. Nothing in the legislative history of § 437h indicates that the provision was to be used in these circumstances.

C. Federal Courts have Narrowly Construed the Extraordinary Process of § 437h.

FECA's extraordinary jurisdictional provision for review of constitutional challenges has received appropriately narrow interpretation by most federal courts. Even in *Buckley* v. *Valeo*, *supra*, the case for which § 437h was designed,[27] the court of appeals recognized the necessity of limiting certification to the *en banc* court of appeals.[28]

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spect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power"); *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971) (principles which guide injunctive relief will also guide granting of declaratory judgment); *Lampkin* v. *Connor*, 360 F.2d 505, 508, 509 (D.C. Cir. 1966) (broad discretion exists to decline to issue declaratory judgments).

[27] *See* note 13, *supra*.

[28] The court of appeals, in preliminarily "deeming [*Buckley*] to be properly certified . . . under § 437h and declaring that it would be considered *en banc*, . . . took care . . . to base its decision to hear

In exercising the inherent discretion of federal courts in declaratory actions,[29] courts have generally focused on five questions raised by the assertion of § 437h jurisdiction: (1) whether constitutional issues raised as affirmative defenses are appropriate for certification; (2) whether plaintiffs have statutory standing to raise the issues presented; (3) whether the action presents substantial constitutional questions; (4) whether the action challenges applications of the Act as opposed to facial challenges; and (5) whether the challenges are ripe for judicial consideration.

Thus, in *United States* v. *Clifford*, 409 F. Supp. 1070 (E.D.N.Y. 1976), a criminal prosecution under former 18 U.S.C. § 610, the court rejected the defendant's effort to invoke § 437h for review of constitutional defenses:

> The case at bar was not directed at determining the constitutionality of the Act. Rather this is a criminal action; the constitutional attack was raised by way of motion. There is no need for the expedited review provision of § 437h in a criminal action, since review may be had on appeal.

Id. at 1072.[30]

And in a case strikingly similar to the instant action, the District Court for the District of Columbia recently decided affirmative constitutional defenses in the context of an enforcement action, rather than using the certification procedure of § 437h. *Federal Election Commission* v. *National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed* Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980). In that case, as in the instant case, an injunctive and declara-

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the case *en banc* upon Rule 35(a) of the Federal Rules of Appellate Procedure and upon the statutory enactment of long-standing judicial custom, 28 U.S.C. § 46(c), so as not to foreclose later argument under separation of powers that Congress may not compel a sitting *en banc*, as the plain words of § 437h would imply." 519 F.2d at 902 n. 2. *See* note 19, *supra*.

[29] *See* note 26, *supra*.

[30] *But see* note 21, *supra*.

tory action alleging § 437h jurisdiction was filed shortly after the Commission notified the parties that a civil enforcement action had been authorized. *National Right to Work Committee* v. *Federal Election Commission*, No. 77-786 A (E.D.Va.). The Commission's enforcement action was filed shortly thereafter. *Federal Election Commission* v. *National Right to Work Committee*, No. 77-2175 (D.D.C.). Defendants in that enforcement action raised as defenses the same constitutional challenges raised in their § 437h suit. Thus, the Virginia case was transferred and consolidated with the Commission's action. A comprehensive factual record was then compiled by the parties through extensive discovery. On the basis of that record, the court, after determining the statutory reach, decided the constitutional questions as affirmative defenses without certification under § 437h. Thus, traditional concepts of both constitutional adjudication and appellate review have been preserved through the appropriate judicial review provision of § 437g.

A second focus of federal courts in cases alleging § 437h jurisdiction, concerns statutory standing to invoke the unique provision.[31] The initial decision addressing this issue was *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (per curiam), *aff'd sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (per curiam). The court of appeals concluded:

> As a voter Clark protested no specific veto action taken by the Congress and identified no proposed regulation tainted by the threat of veto on review. *Nor does he suggest that facial provisions of the Act inhibit his political activities as a voter in any way.*

559 F.2d at 647 (emphasis added).

More recently, the United States District Court for the District of Columbia recognized that:

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[31] The express wording of § 437h states that "[t]he . . . Commission, the national committee of any political party, or any individual eligible to vote . . . may institute such actions. . . ."

> [A]ccess to court pursuant to § 437h(a) was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States. . . ."

Martin Tractor, 460 F. Supp. at 1019. The court limited actions ". . . appropriate for vindication in a special declaratory judgment action under § 437h . . . to those filed by eligible voters who put . . . at issue . . . their rights as voters . . . particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue. . . ." *Id.*[32] And, on a motion to intervene, the United States District Court for the Eastern District of New York concluded:

> To construe either of these statutes as granting movants an unconditional right to intervene would require this court to permit *every eligible voter in the United States the same right.* Congress could hardly have contemplated such a result in a statute designed for expedited judicial review.

Republican National Committee v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978) (emphasis added).

Several federal courts have also concluded that only substantial questions need be certified to the *en banc*

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[32] The court of appeals in *Martin Tractor* found it unnecessary to reach the scope or applicability of the standing issue. 627 F.2d at 378. *Cf., Bread Political Action Committee* v. *Federal Election Commission*, 591 F.2d at 29, 35 n.11 (adopting a broader interpretation but noting that this was contrary to a finding of the D.C. circuit), *adhered to*, No. 80-1146, slip op. at 6 (7th Cir. Dec. 5, 1980) (*en banc*) (declining to overrule the earlier decision of the panel). In the instant action, the court below simply stated, without analysis, that "[s]tanding and jurisdiction are conferred by, *inter alia*, 2 U.S.C. § 437h(a)." J.S. at A-3. Clearly, neither CMA nor CALPAC fall within the categories named by Congress. Additionally, neither of the named individual plaintiffs put at issue their right to contribute over $5,000 to CALPAC. Rather, the action challenges the asserted right of CMA to contribute over $5,000 to CALPAC.

courts of appeals under § 437h. *Mott*, 494 F. Supp. at 131; *Gifford* v. *Congress*, 452 F. Supp. 802 (E.D. Cal. 1978) (no certification where action frivolous, requiring dismissal under 28 U.S.C. § 1915(d)); *Buckley* v. *Valeo*, 387 F. Supp. 135, 138 (D.D.C. 1975). Additionally, § 437h has been held inappropriate for actions challenging Commission interpretations of FECA in the nature of regulations and advisory opinions. *National Conservative Political Action Committee* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (1978), *aff'd as modified*, No. 78-1543 (D.C. Cir. March 11, 1980).[33] *See also Mott*, 494 F. Supp. at 135 (initial question of applicability of FECA and regulations inappropriate for court in § 437h action); *Anderson* v. *Federal Election Commission*, No. 80-1664, slip op. at 5 (1st Cir. Oct. 24, 1980).

Finally, federal courts have also generally concluded that a district court is not required by § 437h to certify questions which are not ripe for adjudication. *Martin Tractor*, 627 F.2d at 378 ("nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter"); *Clark* v. *Valeo*, 559 F.2d at 642 (certified questions returned to district court unanswered as case not ripe); *Mott*, 494 F. Supp. at 135 (where allegations so broad as to encompass a spectrum of association and where plaintiff declined to be more specific, a federal court should not pass on constitutional ques-

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[33] The court below concluded that the distinction between facial challenges to the Act and challenges to interpretations or applications of FECA did not avoid difficult constitutional questions but might compound them. J.S. at A-25. However, the court concluded that "an analysis that is facial and yet . . . purports to answer certified questions concerning CMA only is an anomaly." *Id. See also Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir. Dec. 5, 1980) (court rejected the distinction, slip op. at 7-8, but applied a facial analysis, slip op. at 20-22).

tions).[34] *See also Bread Political Action Committee* v. *Federal Election Commission, supra,* slip op. at 21; *Anderson* v. *Federal Election Commission,* No. 80-0272P, slip op. at 6 (D. Me. Oct. 14, 1980).

In sum, the Commission submits that § 437h was improperly employed in the instant action and the *en banc* court was unnecessarily convened. Thus, this Court should dismiss the instant appeal. *See, e.g., Butler* v. *Dexter,* 425 U.S. 262 (1976); *Moody* v. *Flowers,* 387 U.S. 97 (1967); *Public Service Commission* v. *Brashear Freight Lines, Inc.,* 312 U.S. 621 (1941). However, because the district court in *FEC* v. *CMA* awaited the ninth circuit's decision in *CMA* v. *FEC* and because the district court applied that decision with regard to the defenses raised in *FEC* v. *CMA,* the Commission submits that this Court could treat appellants' jurisdictional statement as a petition for *certiorari* and deny the petition. *Certiorari* is specifically authorized as a review procedure in § 437g (a) (9). Viewing appellants' request for review as such would preserve the discretion Congress placed in this Court to review enforcement actions, but would avoid the procedural complexities of vacating the instant case or remanding it to the ninth circuit for consolidation with *FEC* v. *CMA* for any review by this Court that CMA and CALPAC might later seek.

Should the Court determine to entertain this action, for reasons set forth herein and in its Motion to Dismiss the Appeal or in the Alternative to Affirm, the Commission submits that the Court should affirm the appellate court's decision as correctly decided, applying principles established by this Court.

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[34] Indeed, the arguments presented to this Court by *amicus* American Civil Liberties Union merely repeat allegations in *Mott, supra,* deemed by the district court to be so hypothetical as to be unripe for judicial consideration. Amicus ACLU is counsel to plaintiff Mott and, apparently, seeks herein, to circumvent that decision by raising issues that go well beyond the factual and constitutional limitations of the instant action.

II. THE PROVISIONS CHALLENGED BY APPELLANTS VIOLATE NEITHER THE FIRST AMENDMENT NOR THE FIFTH AMENDMENT.

Appellants mount a two-pronged challenge to FECA in an effort to permit CMA, an unincorporated association, to pay without limit for the administration and solicitation expenses of CALPAC. In their first argument, appellants assert that the $5,000 contribution limitation which applies to CMA's payments on CALPAC's behalf violates the first amendment to the Constitution of the United States. In their second argument, appellants assert a violation of the equal protection component of the fifth amendment resulting from the provisions of FECA which regulate corporations and labor organizations, and which exempt from the prohibitions applicable to those organizations payments for the administration and solicitation expenses of a separate segregated political fund.

The court of appeals rejected both of these arguments:

> To accept appellants' constitutional theory would allow associations [like CMA] to channel to any and all political committees, and thence to candidates, unlimited amounts of cash, services, or other things of value. To drive this wedge through the narrow aperture of section 441a would be to shatter the careful design of the Federal Election Campaign Act.

J.S. at A-5. The court below also observed that an "incidental, but nevertheless far-reaching consequence" of appellants' argument would be to grant associations like CMA "a special privilege of unlimited and direct contribution ability, a privilege not extended to individual persons." Id. at A-5 to A-6. With regard to appellants' argument that associations like CMA are disadvantaged vis-a-vis corporations and labor organizations, the court stated:

> The fundamental distinction between the regulatory scheme applied to segregated funds maintained by corporations or unions, on the one hand, and the

> operation of political committees funded by associations on the other, prevents simple comparison between the two. This misapprehension leads to an entirely false issue, *i.e.*, an attempted comparison between these entities. The false comparison cannot be used to declare a major portion of the Act unconstitutional.

Id. at A-22.

The court of appeals was correct in rejecting appellants' arguments. The provisions challenged by appellants violate neither the first nor the fifth amendment.

A. The $5,000 Limit On Contributions To Political Committees, 2 U.S.C. § 441a(a)(1)(A), Is Plainly Within First Amendment Bounds Under The Principles Established By This Court.

Misapplying this Court's analysis in *Buckley*, 424 U.S. at 1, appellants challenge on first amendment grounds FECA's $5,000 limit on contributions to political committees.[35] However, as the court below reasoned, the

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[35] Throughout their pleadings in this case, appellants have obfuscated the parameters of their constitutional challenge by suggesting that the provision of administrative support to a political committee is something less than a contribution within the meaning of the Act. App. Br. at 22. However, the fact that CMA has paid for CALPAC's operating expenses outright, rather than giving CALPAC a monetary contribution which CALPAC in turn could use to pay its operating expenses, does not put CMA's payments outside the definition of "contribution." 2 U.S.C. § 431(8)(A). A gift of "anything of value" plainly describes such in-kind support. This Court implicitly recognized this principle when discussing the analogous situation of defraying expenses for a candidate in connection with a candidate's fundraiser or in connection with travelling on behalf of a candidate. *See Buckley*, 424 U.S. at 36, 37. *See also United States* v. *Chestnut*, 394 F. Supp. 581, 586-587 (S.D.N.Y. 1975), *aff'd* 533 F.2d 40 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976). Indeed, § 431(8)(A)(ii) expressly provides that the payment by any person of compensation for the personal services of another person which are rendered to a political committee is within the meaning of "contribution." *See Federal Election Commission* v. *Committee for a Constitutional Presidency-McCarthy '76*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9074

principles enunciated by this Court in *Buckley* plainly support the conclusion that the provision challenged by appellants is valid under the first amendment.

The $5,000 limit on contributions by persons to political committees, 2 U.S.C. §441a(a)(1)(C),[36] is an integral part of the comprehensive and well-balanced system of contribution limitations chosen by Congress to regulate the influence of money in federal elections.[37] Several of the Act's contribution limitations were challenged in *Buckley*, and were upheld against first amendment attack. Thus, this Court specifically upheld the $1,000 limit on contributions by a person to a candidate and his or her authorized political committees, then 18 U.S.C. § 608(b)(1), 424 U.S. at 23-35; the $5,000 limit on contributions by a multicandidate political committee to a candidate and his or her authorized political committees, then 18 U.S.C. § 608(b)(2), 424 U.S. at 35-36; the limitations on goods and services contributed by individuals rendering volunteer services, then 18 U.S.C. § 591(e)(5)(B), (D), 424 U.S. at 36-37; and the overall $25,000 annual limit imposed on individuals, then 18 U.S.C. § 608(b)(3), 424 U.S. at 38.[38]

(D.D.C. 1979). It would truly undermine the efficacy of the Act's contribution limitations if such in-kind support was not encompassed.

[36] For the definitions of the terms "person", "contribution", and "political committee" as used therein, *see* 2 U.S.C. § 431(11), (8), and (4), respectively.

[37] *See* note 5, *supra*.

[38] This court's analysis in *Buckley* began with the observation, virtually axiomatic, that a major purpose of the first amendment is "to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." 424 U.S. at 14, *citing Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). Further, the Court acknowledged that the first amendment "protects political association as well as political expression." 424 U.S. at 15. Noting that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association," the Court added that "[i]n view of the fundamental nature of the right to associate,

As the court below found, the contribution limitation attacked by appellants herein serves the same governmental interest in preventing corruption or the appearance of corruption found sufficient in *Buckley*. J.S. at A-13 to A-15. The limitation of § 441a(a)(1)(C) is a "proper mechanism" to ensure compliance with the $1,000 limitation on contributions to a candidate. J.S. at A-17. It prevents persons, including associations like CMA, from contributing massive unlimited sums to political committees such as CALPAC, thereby effecting contributions to candidates well beyond $1,000 in amount. In the words of the court below:

> If the limits on payments to a political committee were to be erased, any association could give unlimited funds to a political committee. Donors could in effect use the multicandidate committee as a vehicle for making $5,000 contributions to an unlimited number of candidates and thereby influence, in fact as well as appearance, the use of vast and substantial sums for direct candidate contributions. That would be an egregious distortion of the existing contribution limits of the Act, provisions specifically sustained by the Court in *Buckley*.

J.S. at A-8.

Appellants contend that the court below erred and, without distinguishing this Court's analysis in *Buckley*, assert that "[c]ontributions to political committees are functionally different from contributions to candidates." App. Br. at 8, 22. Clearly, the face of the statute does

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governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'." 424 U.S. at 24, 25, *citing and relying on NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958). Nonetheless, the Court concluded, "[e]ven a 'significant interference' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25, *citing Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

not warrant a different classification for contributions to political committees. 2 U.S.C. § 431(8)(A). In addition to the explicit reference to payments for personal services rendered to a political committee, the phrase "gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office" plainly describes a contribution to a political committee. 2 U.S.C. § 431(8)(A)(ii).

Moreover, contrary to appellants' assertion, a contribution to a political committee has all the attributes of a contribution to a candidate or his or her authorized political committee identified by this Court in *Buckley*. Each is a "symbolic expression of support," and each can only result in political expression "by someone other than the contributor." *Buckley*, 424 U.S. at 21. Contributors who relinquish funds to a political committee suggest "a general expression of support" but "do not communicate the underlying basis for the support." *Id.* As with contributions to a candidate, the "quantity of communication" by the contributor to a political committee does not increase perceptibly with the size of his or her contribution. *Id.* Just as those in control of the candidate's campaign organization may convert the contributions received into direct speech, those in control of the political committee may convert the contributions it receives into direct speech.[39]

Appellants nevertheless postulate that because a political committee "*may* make independent expenditures," (emphasis added) which constitutionally are not subject to limitation under the principles of *Buckley*, 424 U.S. at 44-48, contributions to a political committee necessarily take on the attributes, and receive the protections,

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[39] It may also occur that those in control of the political committee decide to convert the contributions received into contributions to other candidates or committees rather than direct speech. Indeed, this seems to be CALPAC's practice. *See* note 40, *infra*. This actually results in CMA's administrative support of CALPAC being even more attenuated as "symbolic speech" than the contributions to candidates which this Court held could be limited.

of such direct expression. App. Br. at 34, 35.[40] As noted above, the transmutation appellants envision is not supported by this Court's ruling in *Buckley*. Indeed, by upholding the limitations on contributions to candidates while striking down the candidate expenditure limitations, the Court in *Buckley* rejected the suggestion that because expenditures could not be limited, the contributions used to make those expenditures could not be limited.

Moreover, as the court below recognized, to the extent that persons contribute to a political committee, which by definition has a "broad and diverse constituency of supporters," their act takes on a "proxy-like character" quite removed from the "core political expression" protected from limitation. J.S. at A-11 n.5. By so delegating control over the disposition of their contribution, persons suffer no more harm to their speech or associational interests if those in control of the political committee make independent expenditures rather than contributions. The situation is clearly analogous to contributing to a candidate's campaign organization which engages in direct speech in the nature of independent expenditures. The act of contributing to a political committee which makes independent expenditures entails no more than a "symbolic expression of support" which does not increase perceptibly with the size of the contribution

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[40] CALPAC, it should be noted, engages in little, if any, independent expenditure activity, and therefore its activities do not fit within the postulated hypothetical. Public reports filed by CALPAC indicate that in the 1977-78 election cycle its receipts totalled $705,755.72 for the period. Of that amount, $26,100 was expended for contributions to federal candidates, while none was spent for independent expenditures on behalf of federal candidates. In the 1979-80 election cycle CALPAC's receipts thus far total $958,369.50, its contributions to federal candidates $900, and its independent expenditures, again, none. The very purpose of securing multicandidate committee status is to enable a committee such as CALPAC to contribute larger amounts to federal candidates. *Compare* 2 U.S.C. § 441a(a)(1)(A) and (2)(A). Thus, CALPAC's emphasis is clearly on making contributions to candidates rather than independent expenditures.

and which results in political expression carried out "by someone other than the contributor." *Buckley*, 424 U.S. at 21.[41]

In addition to misconstruing the nature of a contribution to a political committee by attempting to liken it to direct speech, appellants' argument fails to recognize that the $5,000 limit on such contributions serves the vital governmental interest of preventing corruption and the appearance of corruption in the federal election process. Appellants' argument suggests, without discussion, that it is beyond the power of Congress to prevent circumvention of the limitation on contributions to a candidate. Because the contribution must pass through the political committee before reaching the candidate, appellants contend that the dangers of *quid pro quo* relationships are extinguished. App. Br. at 8, 32, 33.

However, this Court clearly found the governmental interest in preventing evasion of the $1,000 per candidate limitation sufficient to uphold the other contribution limitations challenged in *Buckley*. For example, this Court upheld the limitations on individuals' contributions of certain goods and services in connection with volunteer activities (contributions which would otherwise be completely exempt from the $1,000 per candidate limit) on the ground that they "foreclose[d] an avenue of abuse." *Buckley*, 424 U.S. at 37. The Court also upheld the $25,000 annual limitation placed on individuals' contributions, whether to candidates or political committees:

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[41] It does not suffice to label contributions to political committees as a third category, "donations." App. Br. at 23 n.19, *citing* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 Yale L.J. 953 (1977). A contributor who relinquishes control over his or her funds to a political committee is engaging in the same type of speech and associational act as a contributor to a candidate's campaign organization. In both situations, the contributor selects the recipient whom the contributor hopes will express his or her own views and does so in the belief that a contribution may be the most effective way to engage in political activity.

> This quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

Id. at 38.

Congress explicitly stated that the purpose of the $5,000 limit was, *inter alia*, to prevent evasion of the per candidate limitations:

> The conferee's decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or a multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate;* second, these limits serve to assure that candidates' reports reveal the root source of the contributions the candidate has received; and third, these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.

H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 57 (1976) (emphasis added). Congress thus recognized the potential for abusing the limitation on contributions to candidates if a person could contribute massive sums to political committees likely to support a candidate. With each committee able to contribute $1,000 (or $5,000 if a multicandidate committee such as CALPAC) a person easily could effect contributions to a candidate well in

excess of the $1,000 limit for direct contributions. This problem could occur most readily in the case of persons like CMA which are not subject to the overall $25,000 annual limitation. By restricting the amount that such persons may give to a political committee to $5,000 per calendar year, the opportunity for indirectly effecting additional large contributions to candidates is reduced.[42]

Appellants essentially disagree with Congress's judgment that the $5,000 contribution limitation is a necessary and proper mechanism to prevent circumvention of the per candidate limitations. Their argument that Congress should have left persons free to contribute without limit to political committees because the committees themselves are limited in the amount they may contribute to candidates, App. Br. at 33, 34, ignores the realities of the contribution process and the means that can be employed to funnel large contributions to candidates. A person with large sums to contribute, such as CMA, would not require a great deal of political sophistication to channel large contributions to political committees likely to contribute to a particular candidate.[43]

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[42] This interest alone is sufficient to sustain the limitation. The additional reasons cited by Congress are also significant, however. For example, restricting the amount which political committees may receive from a particular person ensures that the disclosure reports filed by the ultimate recipient of contributions accurately reflect the root source of the funds received. Indeed, this Court found that disclosure of the root source of contributions served substantial interests as a means for the public to evaluate candidates. *Buckley*, 424 U.S. at 66, 67, 72.

[43] Local and state political party committees, for example, would offer an obvious avenue for such contributions. Such committees are within the meaning of "any other political committee" as used in 2 U.S.C. § 441a(a)(1)(C). For persons with more political sophistication, of course, the pool of political committees which could be used to effect contributions to a particular candidate is greatly expanded. Appellants themselves note the dramatic rise in the number of political action committees in recent years. App. Br. at 25 n.22, 27 n.60. Because the reports of political committees' contribution practices are publicly available, *see* 2 U.S.C. §§ 432(g), 434, 439, there is easy access to the type of information which could

As Congress clearly concluded, the other provisions of the statute which help prevent evasion of the per candidate limitations are not adequate by themselves to stem the flow of dollars into candidate coffers through the simple device of contributing to political committees likely to contribute to particular candidates. Thus, although the statute attributes as contributions to a candidate those payments made to the candidate's authorized committee, § 441a(a)(7)(A), those payments made in cooperation or in concert with the candidate, § 441a(a)(7)(B)(i), those payments made to republish or disseminate materials produced by a candidate, § 441a(a)(7)(B)(ii), and those payments "earmarked" for a particular candidate, § 441a(a)(8), none of these provisions covers the making of an unearmarked, uncoordinated contribution to a political committee likely to contribute to a preferred candidate.[44] As the court below observed:

> It is quite plausible that the difficulty of tracing funneling to candidates, especially by tacit arrangements falling short of coordination, is sufficiently great that a preventive limitation is required in the form of an absolute dollar ceiling on the ability of "persons" (including associations) to contribute to political action committees (which might then "funnel" excessively to candidates).

J.S. at A-10.

Appellants' first amendment argument thus founders because the speech and associational interest of contributors to political committees, and the governmental inter-

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lead one to select political committees likely to support a preferred candidate.

[44] Through its regulations, the Commission has made an effort to make effective these other measures which also help prevent evasion of the per candidate limitation. *See* 11 C.F.R. §§ 110.6(b), 110.1(h). However, these provisions do not reach all the situations which only an across-the-board per committee limitation can reach. Even without a "designation, instruction, or incumbrance" or without retaining "control over the funds" a person can, with relative ease, still effect contributions to a candidate by giving to political committees likely to support the candidate.

est in preventing corruption or the appearance of corruption are the same as those analyzed in *Buckley*. Like the contribution limitations upheld in *Buckley*, § 441a(a)(1)(C) "entails only a marginal restriction on the contributor's ability to engage in free communication," 424 U.S. at 20, and furthers the "weighty interests" already found sufficient by this Court. J.S. at A-10.

Even with § 441a(a)(1)(C) intact, the statutory scheme provides substantial freedom for CMA, CALPAC, and their members to engage in political speech and association. CMA, as a "person" under 2 U.S.C. § 441a(a)(1), may contribute $1,000 per election to as many candidates as it chooses, may contribute $5,000 per year to CALPAC and as many other political committees as it chooses, and may contribute $20,000 per year to the national party committees. Moreover, CMA may make unlimited expenditures independent of any candidate as a result of this Court's ruling in *Buckley*, 424 U.S. at 44-48. CALPAC, as a multicandidate political committee under 2 U.S.C. § 441a(a)(2), may contribute $5,000 per election to as many candidates as it chooses, $5,000 per year to as many political committees as it chooses, and $15,000 per year to the national party committees. The $5,000 limit on contributions to CALPAC does not limit the overall amount which CALPAC may receive to make contributions or independent expenditures, and there is no record showing that the limit of § 441a(a)(1)(C) has had a "dramatic adverse effect" on CALPAC's fundraising abilities.[45]

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[45] In response to concerns that the limitations on contributions dealt with in *Buckley* would preclude candidates and political committees from amassing the resources necessary for effective advocacy, this Court stated:

> There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who

Even more significant to the speech and associational interests of CMA's and CALPAC's members is the fact that, as individuals, they each may contribute $1,000 to candidates, $5,000 to political committees, and $20,000 to national party committees. Appellants have not and cannot construct a persuasive argument that the speech and associational interests of CMA's and CALPAC's members are impermissibly burdened by the $5,000 limit on CMA's contribution to CALPAC, when in fact each and every member of CMA and CALPAC may make gifts of up to $5,000 to CALPAC.

Appellants give no justification for assuming that CMA's members may exercise their political associational rights only through CMA's support of CALPAC instead of through individual, direct contributions to CALPAC. Based upon the membership figures supplied by appellants and the findings of the district court in the related enforcement case, each of CMA's 25,000 members would have had to contribute only slightly more than $5 to fund CMA's administrative support of CALPAC in 1978, which totalled $134,981. App. Br. at 47 n.61, A-2, A-3. It is hardly convincing to argue that because the contributions would be used for operating costs rather than for direct candidate contributions, the contributors would be reluctant to give this sum to CALPAC. App. Br. at 35. The amount is not overbearing, and such contributors surely would be aware that every political committee must incur operating costs in order to carry out its functions.

Even assuming that CMA's members prefer to have CMA collect funds from them and then pay for CALPAC expenses, the statute does not require that practice. To the contrary, the statute allows CMA's members to fund CALPAC up to the amount of $5,000 per member. Certainly, the minimal restriction of § 441a(a)(1)(C) does

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would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21, 22 (footnote omitted).

not prevent CMA's and CALPAC's members from exercising this right.

B. The Provisions Of FECA Which Separately Regulate Corporations And Labor Organizations Do Not Invidiously Discriminate Against Unincorporated Associations.

Appellants next attack 2 U.S.C. § 441b(b)(2)(C) and 2 U.S.C. § 431(8)(B)(vi), which allow a corporation or labor organization to pay for the establishment, administration, and solicitation expenses of a separate segregated political fund. Appellants argue that these provisions are unconstitutional under the equal protection component of the fifth amendment. App. Br. at 40-49. In effect, CMA and CALPAC attack the longstanding treatment of corporations and labor organizations as a separate classification under 2 U.S.C. § 441b and its predecessor provisions.[46] Throughout their argument alleging unequal treatment, appellants ignore the fact that corporations and labor organizations, unlike unincorporated associations, may not, consistent with FECA, make contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a).[47] Section 441b(b)(2)(C), the provision challenged, is but a narrow exception to that prohibition. What appellants present as an argument for unin-

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[46] Numerous federal courts have held the prohibition constitutional in the context of specific cases. *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir., Dec. 5, 1980) (en banc); *United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *National Right to Work Committee*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9122 (D.D.C. 1980), *appeal docketed*, Nos. 80-1487, 80-1488 (D.C. Cir. May 7, 1980); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D.Pa. 1916).

[47] *See* note 5, *supra*.

corporated associations having the same status as corporations and labor organizations, is in fact an argument for preferred status. That is, appellants would allow unincorporated associations to make unlimited payments for the administration of political committees without simultaneously prohibiting their other contributions or expenditures and without imposing restrictions on the scope and methods of their solicitations.[48]

As the court below observed, however, the fundamentally distinct regulatory scheme applied to corporations and labor organizations prevents any simple comparison between them on the one hand, and unincorporated associations on the other. J.S. at A-21 to A-24. Consequently, "[n]o constitutional discrimination or first amendment burden or injury can be demonstrated from the differential treatment." *Id.* at A-23, A-24.

This Court has stated that the act of classifying does not itself deprive anyone of equal protection of the laws. *See, e.g., Carrington* v. *Rash*, 380 U.S. 89, 92 (1965), *relying on Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955), *reh. denied*, 349 U.S. 925 (1955). Since all legislation involves some degree of classification, the Court has upheld federal statutes which establish reasonable classifications. *Buckley*, 424 U.S. at 93-108; *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), *reh. denied*, 420 U.S. 966 (1975); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 562-568 (1939).[49]

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[48] Appellants offer no definition for the "associations" that would gain this preferred status. They disregard, therefore, the difficulty of distinguishing between a *bona fide* association and individuals merely labeling themselves as such for the purpose of taking advantage of this new exception to FECA's contribution limitations.

[49] The concept of equal protection means that laws must apply alike "to all in the same situation." *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 412 (1910). However, corporations and labor organizations long have been treated as special creatures of the law. Corporations are recognized as separate and distinct legal entities subject to a unique body of law. *Dartmouth College* v. *Woodward*, 17 U.S. 250, 303 (4 Wheat. 518, 636) (1819); *Wilson* v. *United*

The legislative history of 2 U.S.C. § 441b demonstrates that Congress had a rational basis for, and indeed a compelling interest in, separately limiting the political contributions and expenditures by corporations and labor organizations. The first congressional effort in this area was directed only at corporations.[50] The Act of January 26, 1907 (the Tillman Act), 34 Stat. 864, prohibited corporations from making "a money contribution in connection with" any federal election. This Act was spawned by specific instances of abuse by corporations, particularly during the 1904 presidential elections. *UAW*, 352 U.S. at 570-575 (citing extensive legislative history).

In 1925, with passage of the Federal Corrupt Practices Act, 43 Stat. 1070, Congress undertook a comprehensive revision of existing election legislation which by then also included reporting requirements and candidate con-

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States, 221 U.S. 361 (1911); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Labor unions too have been recognized as separate functioning institutions. *United States* v. *White*, 322 U.S. 694, 703 (1944); *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922).

Where Congress has wished to treat corporations and unincorporated associations alike, it has expressly so provided. *See, e.g.*, 26 U.S.C. § 7701(a)(3) and *Morissey* v. *Commissioner of Internal Revenue*, 296 U.S. 344 (1935) (trust held to be association within meaning of § 7701's definition of "corporation"). On the other hand, where Congress has wished to treat corporations differently than unincorporated associations, this Court has approved the distinction on grounds of "certainty of application" and deference to the legislature. *United Steelworkers of America, AFL-CIO* v. *R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (labor union not treated as corporation for diversity jurisdiction purposes). *See also Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 546-547 (1922); *Mallinckrodt Chemical Works* v. *Missouri*, 238 U.S. 41, 55-56 (1915); 28 U.S.C. § 1332(c).

[50] The evolution of 2 U.S.C. § 441b is set forth, through the 1971 legislation, in *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972) (*"Pipefitters"*); *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948) (*"CIO"*); and *United States* v. *International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America*, 352 U.S. 567 (1957) (*"UAW"*).

tribution and expenditure limitations. As part of the 1925 revision, the ban on corporate contributions was strengthened by changing the phrase "money contribution" to the broader term "contribution." Express provision was made for penalizing the recipient of a forbidden corporate contribution, as well as the contributor. *UAW*, 352 U.S. at 576, 577; *CIO*, 335 U.S. at 113, 114.

In 1943, Congress extended the statute's coverage to labor organizations for the duration of World War II. War Labor Disputes Act of 1943 (Smith-Connally Act), 57 Stat. 163. As this Court recounted in *UAW*, 352 U.S. at 578:

> The need for unprecedented economic mobilization propelled by World War II enormously stimulated the power of organized labor and soon aroused consciousness of its power outside its ranks. . . . And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pushing a similar course, and with the same untoward consequences for the democratic process.

Subsequent massive contributions and expenditures by labor unions during the 1944 national elections brought about the permanent prohibition of contributions by labor organizations under the Labor Management Relations Act (Taft-Hartley Act) of 1947, 61 Stat. 159. *UAW*, 352 U.S. at 578-584; *Pipefitters*, 407 U.S. at 403-405. The 1947 legislation also added the term "expenditure" to the overall prohibition and extended coverage to primary elections.

Thus, by 1947 the scope of the statute was virtually the same as it is today. Codified at 18 U.S.C. § 610, it read in pertinent part:

> It is unlawful . . . for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary elec-

> tion or political convention or caucus held to select candidates for any of the foregoing offices. . . .

Only corporations and labor organizations were within its coverage.

The next major reassessment of federal election law came in 1971 with the passage of the Federal Election Campaign Act of 1971, *supra*. This Act repealed the existing candidate and committee contribution and expenditure limitations and imposed in their place certain broadcast communication expenditure limitations and a comprehensive reporting system for federal candidates and their committees. In addition, in what became known as the Hansen amendment, Congress added a definition for "contribution or expenditure" including those provisions now codified at 2 U.S.C. § 441b(b)(2)(A), (B), and (C). *See Pipefitters*, 407 U.S. at 409-412, 421-427, 429-432.[51]

The Federal Election Campaign Act Amendments of 1974, *supra*, reimposed limitations on the amount which individuals and political committees could contribute to candidates ($1,000 and $5,000 per election, respectively) and on the amount which individuals could contribute overall in a calendar year ($25,000). Independent expenditures on behalf of a candidate were limited ($1,000 per year) and candidates themselves were limited in the amounts they could spend in their campaigns. Congress also exempted from the reporting provisions and the independent expenditure limitations those expenditures already exempted by then 18 U.S.C. § 610(b). 2 U.S.C. § 431(e)(5)(F), (f)(4)(H) (1975) and 18 U.S.C. § 608(e)(2)(B) (1975), quoted in *Buckley*, 424 U.S. at 147, 149, 194.

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[51] Appellants equivocally suggest that the exemption from then § 610 pertaining to payments for the establishment, administration, and solicitation expenses of a separate segregated fund "may be constitutionally required by [*Pipefitters*]." App. Br. at 43. However, appellants provide no support for this supposition. In fact, this Court in *Pipefitters* only held that the exemption of § 441b(b)(2)(C) may have made lawful what was previously unlawful and that the petitioners remained punishable under the

In 1976, after this Court's decision in *Buckley*, Congress once again made several changes in the Act. As one of those changes, Congress added the $5,000 limitation on the amount persons or multicandidate committees could contribute to political committees. 2 U.S.C. § 441a (a) (1) (C), (2) (C). At that time Congress also amended then 18 U.S.C. § 610 to clarify the respective rights of corporations and labor organizations and to move the statute's prohibitions from the criminal code to its present location at 2 U.S.C. § 441b.

As the foregoing legislative history indicates, Congress has long considered large-scale election activity by corporations and labor organizations to pose special problems. Congress concluded first that corporations', and later that labor organizations', aggregations of wealth presented such disruptive power and influence in connection with federal elections that prohibitions on contributions and expenditures were justified. Congress's conclusion that certain exceptions should be allowed for specified communications and non-partisan activities and for the administration of separate segregated political funds does not negate the underlying rationale of the classification.

In its efforts to reform the political process by imposing tightly drawn restrictions on corporations and labor organizations, Congress has not committed constitutional error by not treating individuals or other organizations in the same manner.[52] Indeed, Congress

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previous existing statute. 407 U.S. at 428-435. The Court specifically stated that its disposition of the case (reversal due to faulty jury instructions and remand to the district court for further proceedings) "makes decision of the constitutional issues premature, and we therefore do not decide them." *Id.* at 400. The constitutionality of § 441b has never been decided by this Court. *See CIO*, 335 U.S. at 121-124; *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 n.26 (1978). However, every lower court that has addressed its provisions has upheld their constitutionality. See note 46, *supra*.

[52] Recently the United States Court of Appeals for the Seventh Circuit upheld the distinction made in 2 U.S.C. § 441b(b) (4) between corporations and labor organizations, on the one hand, and

might well have concluded that all organizations posed such a similar threat of abuse that they should all fall within the same restrictions as corporations and labor organizations.[53] Congress, however, did not. The constitution does not require that Congress place unincorporated associations within the narrow exemption of

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incorporated trade associations on the other. *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146 (7th Cir. 1980). The Court observed:

> [T]he somewhat dissimilar treatment of corporations, labor organizations, membership organizations and trade associations under Section 441b(b)(4) follows from the rather obvious facts that each of the different groups has a different structure and different kind of constituency and that each requires somewhat different regulation to curb abuses the Act was intended to halt. Regulatory distinctions and exceptions tailored to serve a substantial governmental interest, as here, do not violate the Fifth Amendment's equal protection provision. *See Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99.

Id., slip op. at 16, 17. Thus, different treatment even within the prohibition of § 441b has been upheld.

[53] Appellants place reliance on this Court's holding in *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 765, apparently for the proposition that Congress cannot differentially regulate corporations and labor organizations on the one hand, and unincorporated associations on the other. App. Br. at 48. To the contrary, *Bellotti* rejected the approach suggested by appellants herein. *Id.* at 775-6. The Court's analysis in *Bellotti* was to protect society's interest in receiving information, regardless of the source of the information, at least in the absence of a demonstration that regulation of the source itself served a substantial governmental interest. Moreover, as the court below in this case observed:

> Any suggestion that our approval of the different regulatory mechanisms used in the case of corporations, and labor unions, on the one hand, and associations, on the other, is the same as the impermissible "differential muffling" that was disapproved in *First National Bank, supra*, 435 U.S. at 788-92, rests on an inapposite analogy between the issues and holdings in that case and ours.

J.S. at A-24 n.13.

§ 441b(b)(2)(C), where such associations are not restricted by § 441b in the first place but instead are regulated by the contribution limitations of § 441a, along with individuals, political committees, and other "persons." [54]

Additionally, this case does not present, as appellants assert, a situation where a statute restricts one class of persons to enhance the relative voice of others. App. Br. at 49. Here the statute restricts one class of persons (corporations and labor organizations) in order to avoid particular abuses—the influence in federal elections of those controlling large aggregations of capital and the use of funds for political purposes without the consent of the minority. *See Cort* v. *Ash*, 422 U.S. 66, 80-82 (1975). The statute also restricts another class of persons (individuals, partnerships, political committees and unincorporated associations) because they may cause another type of abuse—corruption or the appearance of corruption through circumvention of the $1,000 limit on contributions to candidates. *See Buckley*, 424 U.S. at 25-27; H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 57-58 (1976). No one class is being disadvantaged in order to give a greater advantage to another class. *Cf. Buckley*, 424 U.S. at 48, 49.

Appellants are not harmed by the Act's classifications, as the court below observed. J.S. at A-23. Because CMA is unincorporated and thus not limited by the prohibitions of § 441b, it is allowed to contribute to political candidates and committees, to make independent expendi-

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[54] It should be noted that even the dissenting judges in the court below did not believe that the exemption of § 441b(b)(2)(C) is constitutionally underinclusive by not including unincorporated associations. Rather, they would have found § 441a(a)(1)(C) constitutionally underinclusive because it does not include the payments made by corporations and labor organizations for the administration of their separate segregated political funds. J.S. at A-70, A-71. The latter conclusion, of course, disregards the impact of the other restrictions that apply to corporations and labor organizations and the careful judgment that Congress has made in allowing only certain confined exemptions for these organizations.

tures on behalf of candidates, to make partisan communications beyond its own membership, and to solicit not only its own members and employees, but also anyone else it chooses for contributions for political purposes.[55] Corporations and labor organizations, on the other hand, can make neither contributions nor expenditures in connection with federal elections. Partisan communications by corporations and labor organizations and voter registration and get-out-the-vote activities may not extend beyond the stockholders, executive and administrative personnel, members, and their families. Solicitations for contributions to a corporation's or labor organization's separate segregated fund are specifically restricted by the statute in terms of who may be solicited and when and how they may be solicited. 2 U.S.C. § 441b(b)(3), (4).

Appellants argue that constitutionally Congress must permit all associations the benefit of an exception to a broad prohibition directed only at corporations and labor organizations. But, appellants do not argue that the concomitants of the broad prohibition—the denial of a right to make direct contributions to candidates or committees or independent expenditures on behalf of candidates or to solicit contributions freely—also should extend to all associations. By this attack, appellants seek to establish as a matter of constitutional law the proposition that the exception is greater than the prohibition; that because the exception allows to corporations and labor organizations a particular activity as part of a

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[55] Appellants suggest that it is not a significant benefit for CMA to be able to solicit anyone it chooses. App. Br. at 46. It is pure conjecture, however, to assume that CMA could not benefit from soliciting beyond its membership. Related health professions and persons associated with the medical field presumably would provide a lucrative body of solicitees. In addition, appellants imply that if CMA were to contribute to candidates, its members would resign. App. Br. at 46 n.59. However, CMA spent a total of $318,833 between May 11, 1976, and December 31, 1978, to enable CALPAC to make contributions to candidates, and yet CMA has not demonstrated any resulting loss of members.

comprehensive regulation, that activity must be extended as a right of all associations. However, the statutory scheme created by Congress, by setting its present balance, has met the constitutional requirements of due process.

CONCLUSION

This Court should dismiss this case as an improper appeal under § 437h, and, treating appellants' jurisdictional statement as a petition for *certiorari*, either deny the petition or affirm the judgment of the court of appeals.

Respectfully submitted,

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